

4. The defendant is Andrew Saul in his official capacity as Commissioner of the Social Security Administration (“SSA”). SSA is the federal agency that administers the Supplemental Security Income program under the Social Security Act.

STATUTORY BACKGROUND

5. The FOIA requires federal agencies to release records to the public upon request, unless a statutory exemption to disclosure applies. 5 U.S.C. §§ 552(a), (b). If any portion of a requested record is exempted from disclosure, agencies are required to release “[a]ny reasonably segregable portion of a record . . . after deletion of the portions which are exempt[.]” 5 U.S.C. § 552(b).

6. The FOIA requires federal agencies to respond to record requests within 20 working days. 5 U.S.C. § 552(a)(6)(A)(i). In “unusual circumstances,” an agency may delay its response to a FOIA request or appeal, but in those cases, the agency must provide notice to the requester along with an expected date by which a determination will be issued. 5 U.S.C. § 552(a)(6)(B); *see also* 20 C.F.R. § 402.200 (SSA regulation governing FOIA appeals process and timeline).

7. SSA administers the Supplemental Security Income (“SSI”) program established under the Social Security Act. 42 U.S.C. § 1382 *et seq.* The SSI program provides assistance to qualified low-income individuals.

8. SSA maintains “Supplemental Security Income Display” (or “SSID”) information relating to individuals’ entitlement to benefits under the Supplemental Security Income program. SSID records include two fields reflecting the computational and payment history with respect to beneficiaries’ entitlement to Supplemental Security Income benefits.

9. SSA routinely furnishes SSID information to the Centers for Medicare & Medicaid Services (“CMS”), a component of the Department of Health and Human Services that administers the Medicare program. CMS uses SSID information to determine Medicare reimbursement levels for “disproportionate share” hospitals that incur higher costs in treating low-income patients, including Medicare beneficiaries who are also entitled to SSI benefits. The Medicare disproportionate share hospital payment is determined in relevant part based on a hospital’s percentage of Medicare patients who are entitled to SSI benefits. *See* 42 U.S.C. § 1395ww(d)(5)(F)(vi)(I) (statute authorizing disproportionate share hospital payment adjustment); 42 C.F.R. § 412.106(b) (regulations implementing same).

FACTUAL AND PROCEDURAL BACKGROUND

10. By letter dated March 6, 2017, the plaintiffs filed a FOIA request with the SSA Office of Privacy and Disclosure. Exhibit 1 (redacted to remove personally identifying information related to beneficiaries).

11. The March 6, 2017 FOIA request sought copies of all “Supplemental Security Income Display” (“SSID”) records for 433 deceased Medicare beneficiaries who had received treatment at Medicare-participating disproportionate share hospitals. That FOIA request specifically sought SSID records reflecting “the computation history field and payment history field” for specified dates of hospital services furnished to those Medicare beneficiaries.

12. In a detailed memorandum that accompanied their FOIA request, the requestors explained that they seek the requested records in order to verify CMS payment calculations in connection with administrative appeals challenging Medicare disproportionate share hospital payment determinations before the Medicare Provider Reimbursement Review Board. *Id.*, *see also* 42 U.S.C. § 1395oo (providing reimbursement appeal rights to hospitals that participate in

the Medicare program). The hospitals cannot elsewhere obtain the requested SSID information, which is in the sole custody and control of SSA.

13. By letter dated July 14, 2017, SSA denied the hospitals' FOIA request in full, stating incorrectly that the requested SSID records are exempted from disclosure under the FOIA. Exhibit 2.

14. By letter dated August 18, 2017, the requestors timely appealed SSA's July 14, 2017 denial of their FOIA request, noting that the agency had not met its burden to show that the requested records were exempt from disclosure. Exhibit 3. The requestors further explained that their FOIA request is virtually identical to a request submitted in 2003 for the exact same type of SSID records with respect to other Medicare beneficiaries. That 2003 request, like the 2017 request at issue here, was made for the purpose of confirming the accuracy of the calculation of Medicare disproportionate share hospital payments made by CMS. *See* Attachment 1 to Exhibit 3 (other attachments omitted), *see also Baystate Med. Ctr. v. Leavitt*, 545 F. Supp. 2d 20, 25 (D.D.C. 2008) (noting that the hospital that submitted the 2003 request "obtained disclosure of a sample of 627 individual-specific SSI eligibility records."). Attached at Exhibit 4 is a redacted copy of one of the SSID records that SSA produced in response to that 2003 request, with personally identifying information removed.

15. By letter dated December 4, 2017, SSA reversed its decision to withhold all of the records sought in plaintiffs' 2017 FOIA request, and determined that the agency "can release portions of the requested SSIDs under the FOIA subject to proper proof of death and receipt of payment." Exhibit 5. SSA's letter also asked the requestors to clarify that the information requested is the same type of information that SSA had previously provided in response to the 2003 FOIA request, referenced above, and to confirm that the hospitals were willing to pay the

processing fees. *Id.* The requestors responded affirmatively to both questions by letter dated December 7, 2017. Exhibit 6.

16. In February 2018, SSA again asked the requestors to confirm, and they did confirm, their interest in the long-pending FOIA request by providing payment information to the agency and electronic copies of the patient listings that accompanied the March 6, 2017 FOIA request. Exhibits 7 and 8 (SSA request and hospital response, attachments omitted).

17. By letter dated April 11, 2018, SSA requested that the hospitals provide proof of death for 117 of 433 deceased Medicare beneficiaries listed in the March 2017 FOIA request. Exhibit 9. SSA indicated that it would accept “a copy of an official report of death or finding of death made by an agency or department of the U.S. which is authorized or required to make such a report of finding in the administration of any law of the U.S.” as acceptable proof of death. *Id.*

18. On May 4, 2018, the requestors submitted screen prints from a federal government data file known as the Medicare Common Working File, which reported the dates of death for 116 of the 117 individuals identified in SSA’s April 11, 2018 letter. Exhibit 10 (includes copy of one redacted screen print, other screen prints omitted). The Medicare Common Working File is derived from the Medicare Beneficiary Database, which the Department of Health and Human Services shares with SSA through an established computer matching program. *See, e.g.*, 69 Fed. Reg. 18,664 (Apr. 8, 2004) (establishing data exchange between SSA and CMS); *see also, e.g.*, CMS Program Transmittal No. 1375 (May 1, 2014) (clarifying connection between Medicare Beneficiary Database and Medicare Common Working File).

19. On July 12, 2018, SSA staff replied to the requestors’ counsel that the Common Working File records “are foreign to SSA in that we are not familiar with them.” Exhibit 11.

SSA FOIA staff demanded a “certification from HHS, [without which] we have no proof of the documents [*sic*] validity.” *Id.* SSA regulations do not require the “certification” demanded by SSA FOIA staff with respect to the Common Working File records. *See* 20 C.F.R. 404.720(b)(3) (SSA regulation stating that an “extract from an official report or finding of death made by an agency or department of the United States” constitutes acceptable proof of death); SSA Program Operations Manual System, GN 02602.050 (SSA guidance stating that reports from CMS constitute acceptable “Third-Party Reports Of Death.”), *available at* <https://secure.ssa.gov/apps10/poms.nsf/lnx/0202602050> (last visited October 24, 2019).

20. On September 10, 2018, following a discussion with requestors’ counsel, SSA FOIA staff acknowledged “that the [Common Working File] is accessed by certain SSA and CMS staff in the administration of the Medicare program (under an agreement between both agencies)” but reiterated their purported need for additional proof of death for 116 of the individuals identified in SSA’s April 11, 2018 letter because the FOIA staff themselves allegedly do not have access to the Common Working File. Exhibit 12. SSA FOIA staff agreed at that time to provide SSID records for the rest of the individuals identified in the 2017 FOIA request without further proof of death. *Id.*

21. On February 20, 2019, SSA FOIA staff again contacted the requestors’ counsel seeking clarification of the scope of the hospitals’ original FOIA request. Exhibit 13. This clarification request substantively repeated the earlier request for clarification from SSA FOIA staff in December 2017 (*see* ¶ 15, *supra*). On February 22, 2019, the requestors’ counsel reiterated again that the hospitals requested “hard copies of Supplemental Security Income Displays (SSIDs), current and stale (active or inactive) including the computation history field

and payment history field for the periods noted in the patient listings that accompanied our request.” Exhibit 14.

22. In a letter dated April 3, 2019, which was delivered to the requestors’ counsel on April 8, 2019, SSA refused to produce records for 116 of the 117 individuals for whom the agency demanded and received additional proofs of death (*supra* ¶¶ 18-19), did not produce any records for 113 other individuals identified in the 2017 FOIA request, and produced incomplete records lacking the requested payment and computational history data for the dates of service specified in the FOIA request for the remaining 203 individuals identified in the FOIA request. Exhibit 15 (including a redacted copy of one Supplemental Security Income Display record produced by SSA). The records that SSA provided for just 203 of the 433 individuals identified in the FOIA request are not responsive to the hospitals’ long-pending and often repeated request. Rather than producing the full computation and payment histories for the particular dates of service specified in the FOIA request, SSA produced only the latest entry in each of these fields, generally the data for the month after the periods of hospitalization that were expressly requested, when benefits were terminated. *See id.* The information produced by SSA does not include the eligibility and payment data in the computational and payment histories for the hospitalization periods specified in the FOIA request. *See, e.g.,* Exhibits 5, 6, 14.

23. By letter dated May 2, 2019, the requestors appealed the agency’s failure to produce the information sought in the FOIA request. Exhibits 16 and 17 (exhibits omitted).

24. After the 20-day period for processing their appeal had passed, requestors’ counsel contacted SSA FOIA about the status of the appeal. On June 12, 2019, FOIA staff again asked for clarification of the scope of the FOIA request. Exhibit 18. On June 26, 2019,

requestors' counsel reiterated again the plain language of the original 2017 FOIA request. Exhibit 19.

25. On July 9, 2019, SSA FOIA staff acknowledged that "there was a misunderstanding in what was requested," and stated that the agency was in the process of retrieving the appropriate responsive records. SSA refused to provide a date by which the appeal would be processed but demanded "an additional fee involved with this additional search for records," the amount to be determined later. Exhibit 20.

26. In a letter dated August 19, 2019, SSA claimed that it "determined that [the hospitals'] request is for non-program related purposes" and would therefore charge the requesters more than \$5,000 to process their already-three-year-old FOIA request. Exhibit 21. The August 19, 2019 letter did not mention the fees that SSA had previously charged the hospitals in 2018. Exhibit 7.

27. SSA's August 19, 2019 letter also implied that the hospitals had only recently clarified the scope of their 2017 FOIA request in their May 2, 2019 appeal. *See* Exhibit 21 ("In your appeal, you clarified that you would like the full SSID with the *full* computational and payment history data/field for the dates specified.")(emphasis in original). That letter also reiterated incorrectly that SSA had provided responsive records for 316 deceased beneficiaries. The letter did not address the hospitals' appeal as to the 116 beneficiaries for whom the hospitals had provided the requested proofs of death. *Id.*, *see also* Exhibits 15 (FOIA response) and 16 (second appeal letter).

28. On August 30, 2019, the hospitals appealed SSA's determination that their request was not "program related," and disputed the agency's summary of the facts underlying this long-pending matter. Exhibit 22. Simultaneously, to avoid further delay in the processing of their

FOIA request, the hospitals also authorized payment for the amount specified in SSA's August 19th fee notice (Exhibit 21), while specifying that the authorization does not constitute a waiver of the appeal rights that they were also exercising. Exhibit 23 (email authorizing payment, attachment omitted).

29. By letter dated September 24, 2019, SSA upheld its determination that the hospitals' request was not "program related." Exhibit 24. SSA stated that under its FOIA regulations "when a request for records or information is sought in a legal proceeding, the agency will seek reimbursement." *Id.*

30. It has now been more than two years since the hospitals filed their original FOIA request in 2017. In that time, the agency has not provided the requested SSID payment and computation history information for the dates of services specified in the 2017 FOIA request for any of the 433 individuals identified in that request.

COUNT ONE
(Failure to Produce Records Under the FOIA)

31. Plaintiffs repeat the allegations in paragraphs 1 through 30 of this Complaint as if fully set forth herein.

32. Plaintiffs, through their March 6, 2017 FOIA request, properly requested records that are created by, maintained by, and in the sole custody and control of the SSA.

33. The FOIA requires agencies to respond to information requests within 20 working days. 5 U.S.C. § 552(a)(6)(A)(i); *see also, e.g., Citizens for Responsibility and Ethics in Wash. v. Fed. Elections Comm'n*, 711 F.3d 180, 189 (D.C. Cir. 2014) ("So, within 20 working days (or 30 working days in 'unusual circumstances'), an agency must process a FOIA request and make a 'determination.'") (Kavanaugh). Under the FOIA, a requester has exhausted his or her

administrative remedies once the agency fails to respond to a request within the statutory timeframe. 5 U.S.C. § 552(a)(6)(C).

34. The FOIA requires district courts to “determine the matter de novo,” and “expressly places the burden ‘on the agency to sustain its action.’” *U.S. Dept. of Justice v. Reporters Comm. For Freedom of Press*, 489 U.S. 749, 755 (1989) (citing 5 U.S.C. § 552(a)(4)(B)). And, “[i]f an agency improperly withholds any documents, the district court has jurisdiction to order their production.” *Id.*

35. The plaintiff hospitals filed their request in March 2017, had their appeal granted in December 2017, and because they have received no responsive records from SSA during the two years that this request has been pending, have exhausted their administrative remedies.

36. By failing to release agency records to the public, SSA has violated its statutory obligations under the FOIA and cannot meet its statutory burden to sustain the agency’s inaction.

REQUEST FOR RELIEF

37. WHEREFORE, the plaintiffs request that this Court issue an Order:

- a. Declaring that SSA violated the FOIA by failing to respond to the plaintiffs’ March 6, 2017 FOIA request;
- b. Ordering SSA to process and immediately release all SSID records described in the plaintiffs’ FOIA request;
- c. Retaining jurisdiction of this action to ensure SSA’s compliance with this Order;
- d. Awarding reasonable costs and attorney fees, as permitted under the FOIA, 5 U.S.C. § 552(a)(4)(E); and
- e. Granting such other relief as the Court may consider appropriate.

Respectfully Submitted,

/s/ Stephanie A. Webster

Stephanie A. Webster

D.C. Bar No. 479524

Michael J. McDougall

D.C. Bar No. 1023610

AKIN GUMP STRAUSS HAUER & FELD
LLP

2001 K Street, N.W.

Washington, D.C. 20006

Phone: (202) 887-4049

Fax: (202) 887-4288

swebster@akingump.com

Counsel for Plaintiffs

Dated: October 25, 2019

EXHIBITS

- Exhibit 1 FOIA Request, March 6, 2017
(redacted and numbered sequentially)
- Exhibit 2 FOIA Request Denial, July 14, 2017
- Exhibit 3 FOIA Appeal (1), August 18, 2017
(including attached 2003 FOIA request, other attachments omitted)
- Exhibit 4 Excerpt from Response to 2003 FOIA Request (redacted)
- Exhibit 5 SSA FOIA Appeal Determination, December 4, 2017
- Exhibit 6 Hospital Response to SSA Appeal Determination, December 7, 2017
- Exhibit 7 SSA Fee Notice and Request for Electronic Patient Logs, February 8, 2018
(attachments omitted)
- Exhibit 8 Response to Fee Notice and Request for Electronic Patient Logs,
February 14, 2018 (attachments omitted)
- Exhibit 9 SSA Request for Proofs of Death, April 11, 2018
- Exhibit 10 Email Submitting Proofs of Death, May 4, 2018
(including a redacted copy of one of the 116 attached screen prints from
the Medicare Common Working File)
- Exhibit 11 SSA Request for Certification of Proofs of Death, July 12, 2018
- Exhibit 12 SSA Summary of Conference Call, September 10, 2018
- Exhibit 13 SSA Clarification Request, February 20, 2019
- Exhibit 14 Hospital Response to Clarification Request, February 22, 2019
- Exhibit 15 FOIA Response Letter, April 3, 2019
(including redacted version of one SSID record produced by SSA)
- Exhibit 16 FOIA Appeal (2), May 2, 2019
(exhibits omitted)
- Exhibit 17 FOIA Appeal Clarification Letter, May 8, 2019
- Exhibit 18 SSA Clarification Request, June 12, 2019

- Exhibit 19 Hospital Response to Clarification Request, June 26, 2019
- Exhibit 20 SSA Processing Update, July 9, 2019
- Exhibit 21 SSA Fee Notice, August 19, 2019
- Exhibit 22 Hospital Appeal of Determination that Request is Not Program-Related, August 30, 2019
- Exhibit 23 Response to Fee Notice, August 30, 2019 (attachment omitted)
- Exhibit 24 SSA Response to Program Related Determination Appeal, September 24, 2019